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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.----------

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

— *vs.* —

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS, GREENWOOD COUNTY AND ITS FINANCE BOARD IN OPPOSITION TO THE PETITION FOR CERTIORARI.

STATEMENT.

This Bill in equity was instituted November 7, 1934, in the United States District Court for the Western District of South Carolina against Greenwood County and the members of its Finance Board. Harold L. Ickes, as Federal Emergency Administrator of Public Works, intervened,

was permitted to become a party defendant (R. 65) and filed his answer in the cause (R. 66-94). Motions by the County and by the Administrator to dismiss the Bill were refused (10 Fed.Supp. 854; R. 117-153). After testimony was taken, the District Court granted an injunction preventing the construction by the County of the proposed hydro-electric project with Federal funds (12 Fed.Supp. 70; R. 477-485).

The defendants appealed to the Circuit Court of Appeals, which Court, upon motion and showing by the Administrator that since the taking of the appeal the original contract between Greenwood County and the Administrator had been terminated and a new contract substituted, remanded the cause for the taking of testimony under the changed circumstances (79 F.(2d) 995; R. 515-18).

The District Court, after taking further testimony, entered a second Decree refusing to vacate the original Decree of injunction (R. 527-8). From this Decree appeal was again taken to the Circuit Court of Appeals, which Court reversed the Decree of the District Judge and ordered the Bill dismissed (81 F.(2d) 986).

This Court granted a Writ of Certiorari to the Circuit Court of Appeals (298 U.S. 651) and the cause was argued at the October Term, 1936. The Court, by its opinion (299 U.S. 259) declined to pass on the merits of the case for the reasons stated in the opinion, reversed the Decree of the Circuit Court of Appeals and remanded the cause with directions that the Decrees entered by the District Court be vacated; that the parties be permitted to amend their pleadings in the light of existing facts, and that the cause be retried upon the issues thus presented.

The District Court vacated the former Decrees (R. 541-2) and after supplemental pleadings had been filed by the parties (R. 543-8) proceeded to a hearing upon the merits. The Court upheld the validity of the loan and grant and dismissed the Bill (R. 799-800), filing a full opinion (R. 744-778) as well as separate findings of fact and conclusions of law (R. 779-799).

Upon appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed (___ F.(2d) ___; R. 848-873).

Plaintiffs now petition this Court for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit for a review by this Court of the entire cause.

QUESTIONS INVOLVED.

The questions which plaintiffs seek to present for the determination of this Court may be stated as follows:

1. Did the Circuit Court of Appeals err in holding that Title II of the National Industrial Recovery Act is constitutional, is not violative of the 10th or 5th Amendments, and does not unlawfully delegate legislative powers to the Executive Department of the Government?

2. Did the Circuit Court of Appeals err in holding that the Public Works Administrator was acting properly within the authority conferred upon him by Title II of the National Industrial Recovery Act in making this loan and grant to Greenwood County?

3. Did the Circuit Court of Appeals err in holding that the plaintiffs have no standing to question the legality of the making of this loan and grant even if Title II of the National Industrial Recovery Act be unconstitutional or the Acts of the Administrator be unauthorized?

ARGUMENT.

It is the position of Greenwood County that this Court should refuse the petition for Certiorari because all issues of fact have been correctly determined adversely to petitioners by the Courts below and all questions of law have been determined adversely to petitioners by former decisions of this Court.

Plaintiffs seem to assume in their petition for Certiorari that because this Court granted a Writ to the Circuit Court of Appeals (298 U.S. 651) to review the former proceedings there, such a Writ should again be granted. At that time an important procedural error was urged in the petition and it was proper for this Court to take jurisdiction

of the cause to correct this error, not only to insure that justice be done in this particular cause, but also to avoid the establishment of precedent for improper procedure.

Then too, the record on the facts at the time of the granting of the former Writ of Certiorari was unsatisfactory, the District Court having adopted findings favorable to the plaintiffs and the Circuit Court of Appeals having, to a large extent, either overruled these findings or disregarded them in holding that the Bill should have been dismissed.

There is also the important fact that since the time of the allowance of the former Writ of Certiorari there have issued from this Court important and far-reaching constitutional decisions setting at rest, or at least clarifying, many of the legal issues involved in this cause.

There is no inconsistency between the allowance of the Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia in the cases of *Alabama Power Co. v. Ickes* (2 cases) and *Iowa City Light & Power Co. v. Ickes* (Nos. 84, 85 and 86, October Term, 1937) and the refusal of the Writ in this case. Those cases were decided solely on the right of plaintiffs to maintain their action and the Circuit Court of Appeals refused to pass upon the constitutional questions raised. In our case the Circuit Court of Appeals for the Fourth Circuit not only held that the plaintiffs had no standing to maintain their Bill, but went further and passed upon all the questions of constitutional infringement raised by the plaintiffs, assuming for the purposes of that portion of the opinion that plaintiffs did have a right to maintain their action.

I.

SUMMARY OF FACTS AS DETERMINED BELOW.

This Court has definitely announced the rule that it does not grant Certiorari to review evidence and discuss specific facts.

U. S. v. Johnston, 268 U.S. 220.

Sou. Power Co. v. N. C. Public Service Comm., 263 U.S. 508.

Harris v. Barber, 129 U.S. 367.

The District Court, along with its opinion of May 26, 1937, made certain findings of fact to be found in the Record at pages 779-790. The opinion of the Circuit Court of Appeals, after an examination of the Record, confirmed these findings of fact, not merely by a formal confirmation, but in respect to at least the most important of the findings, by independent references to the portions of the Record sustaining the facts as found by the District Court.

The rule is so well settled that where the findings of fact by a District Court are concurred in by the Circuit Court of Appeals they will not be reviewed by this Court and will be accepted unless clear error is shown, that we shall cite only a few of the more recent cases:

Page v. Arkansas Natural Gas Corp., 286 U.S. 269.
Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks, 281 U.S. 548.
U. S. v. Commercial Credit Co., 286 U.S. 63.
Charleston Min. & Mfg. Co. v. U. S., 273 U.S. 220.
Bodkin v. Edwards, 225 U.S. 221.

In view of this rule, of the explicitness of the findings by the two lower Courts and of the abundant support for these findings in the Record, we think that the following summary of the contested factual elements in the case may now be regarded as the facts of the case.

Application for the loan and grant was made by Greenwood County to the Administrator of Public Works in November, 1933, without solicitation or suggestion from the Public Works Administration (R. 782, 853). The schedule of rates for the sale of electrical energy was prepared by agents of the County without consulting with the Public Works Administrator and that original schedule has never been changed (R. 782, 853).

After consideration of the application by the Administrator of Public Works an allotment was made, and after plaintiffs had been heard in opposition to the allotment, it was reaffirmed and a contract entered into between the Administrator and the County, by which the Administrator agreed to make a grant to the County and to purchase the County's revenue bonds so as to finance the construction of the proposed project (R. 782, 853).

The original contract was superseded by a contract dated Nov. 30, 1935, which new contract eliminated the provision in the old contract that the Government should be under no obligation to advance any money unless the County should have adopted a schedule of rates satisfactory to the Administrator, and specifically providing that neither the Administrator nor the Government should have any right or power with respect to rates to be charged for electrical energy by the County, except such rights as they might have as holders of revenue bonds under the laws of South Carolina (R. 782-83, 854-55). The contract of November 30, 1935, is the contract now in force and upon the basis of which the rights of the parties are to be determined.

Neither the United States nor the defendant Ickes has any power to control the operation of the project after construction is completed (R. 783, 854).

The power of approval or disapproval of a project rests entirely with the Administrator of Public Works and the President. The PWA State engineers, the Examining Divisions of the PWA, the Power Division and the Electric Power Board of Review, all of which were agencies established by the Public Works Administration for the purpose of aiding in the handling of applications and allotments, have had at all time only advisory powers with respect to approvals of applications (R. 783-84).

The Administrator in making this allotment to Greenwood County and in entering into the contract with the County, had no purpose other than that set out in the Act of Congress (R. 788, 857, 866). The policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate (73rd Congress, 2nd. Session, Senate Document 167; Defendants' Exhibit 70):

> The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works thereby increasing the consumption of goods and also providing employment in the capital goods industry.

It was necessary for the Public Works Administration, in order to carry out Congress' mandate that any loan made should be reasonably secured, to examine the rates of private utilities operating in the territory in which the Greenwood County project would be developed. The proposed loan to Greenwood County was to be evidenced by revenue bonds so the Public Works Administration had to satisfy itself that the County's proposed rates were low enough to obtain customers and high enough to yield a revenue sufficient to pay off the bonds (R. 788, 857).

As of January 1, 1937, there were 9389 non-Federal projects of the Public Works Administration, the aggregate allocations therefor being $1,480,612,543.00. Of these only 282 are electric power projects and only 92 involve competition with existing private companies. Allocations for these 92 projects total $27,339,947.00, representing less than 2% of the total amount of allotments and less than 1% of the total number of allotments (R. 786, 856).

Title II of the National Industrial Recovery Act was enacted by Congress for the purpose of increasing employment. The means employed by Congress for this purpose—a program of public works financed in part by the National Government, and in part by the States and their sub-divisions aided by loans and grants from the National Government—in so far as they affect this case, are proper means of carrying out the national purpose of relieving unemployment (R. 787-88).

After the Administrator had, in pursuance of Senate Resolutions, made reports to Congress (Defendants' Exs. 70, 71, 72 and 73) showing the work being carried out by the Public Works Administration, including detailed lists containing names, allocations and types of each approved project and the funds allocated therefor, the Congress enacted the Emergency Appropriation Act, Fiscal Year of 1935 (48 Stat. 1021), the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), the First Deficiency Appropriation Act, Fiscal Year 1936 (49 Stat. 1597), and the Public Works Administration Extension Act of 1937 (Sec. 201, Title II, Pub. Res. No. 47, 75th Congress), all of which Acts authorized the continuance of the Public Works Administration and performance of its functions

and made appropriations for the Public Works Program (R. 785-86, 863).

The determination to engage in the electric generation and distribution business was made by the authorities of Greenwood County of their own free will and any effect that the construction of the County's proposed plant will have on plaintiffs' rights or business will be the result of voluntary construction of the plant by the County and the voluntary decision of the County to use that plant in competition with the plaintiffs (R. 784, 866).

Greenwood County tentatively plans to sell about twelve million kilowatt hours to parties now customers of the plaintiffs. In 1936 plaintiffs sold in the Piedmont section of the Carolinas 2,476,000,000 KWH. From a practical standpoint it is inconceivable that this small competition will result in a forced reduction throughout the entire Duke System (R. 789-90, 858).

The County project could not serve as a yardstick for the fixing of private utility rates because of the difference in construction costs, difference in overhead and freedom from taxation (R. 789, 858, 866).

The project will be self-liquidating and any loan that the Government makes on the revenue bonds of Greenwood County will be reasonably secured (R. 787).

II.

DETERMINATIVE LEGAL AUTHORITIES.

If this Court takes the facts of the case as found by the two lower Courts and applies to those facts the principles of law announced in the decisions which we shall cite below, we think it will find that the case is determined.

A. Title II of the National Industrial Recovery Act does not violate the Constitution.

The enactment of Title II of the National Industrial Recovery Act is within the powers of Congress under the General Welfare Clause.

U. S. v. Butler, 297 U.S. 1.
Chas. C. Steward Mch. Wks. v. Davis, 81 L.Ed. 779.
Helvering v. Davis, 81 L.Ed. 804.

The enactment of Title II of the National Industrial Recovery Act is within the powers of Congress under the Commerce Clause.

U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690.
Arizona v. California, 283 U.S. 423.
Morgan v. U. S., 298 U.S. 468.

Title II of the National Industrial Recovery Act does not violate the 10th Amendment. The Courts below have found the record clear that no regulation of intrastate matters by the Federal Government is involved in the making of this loan and grant. Even were the collateral effect of the statute a regulation of intrastate activities, the statute would not be condemned as violative of the 10th Amendment.

Sonzinsky v. U. S., 81 L.Ed. 556.
Smith v. Kansas City Title Co., 255 U.S. 180.
Hampton & Co. v. U. S., 276 U.S. 394.
Arizona v. California, 283 U.S. 423.

Title II of the National Industrial Recovery Act does not violate the 10th Amendment because involving coercion of State sovereignty.

Chas. C. Steward Co. v. Davis, 81 L.Ed. 779.

There is in Title II of the National Industrial Recovery Act no unlawful delegation of legislative power to the Executive.

Cincinnati Soap Co. v. U. S., 81 L.Ed. 707, 714.
Hampton v. U. S., 276 U.S. 395.
Buttfield v. Strandham, 192 U.S. 470.

Even if it could be said that the original Recovery Act did not provide sufficiently definite standards for the Administrator's actions, Congress by subsequent enactments has adopted and ratified the acts of the Administrator.

Isbrandtsen-Moller Co. v. U. S., 81 L.Ed. 344.
Swayne & Hoyt, etc. v. U. S., 81 L.Ed. 400.

B. In making the loan and grant to Greenwood County the Administrator is not violating the statute.

The Administrator does not have, or seek to have, any control over rates to be charged by the County's project; that control remaining in the sovereignty of the State of South Carolina.

Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870.
Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865.

As held by the Courts below the record shows that, contrary to plaintiffs' contention, the Administrator had no purpose or motive in making this loan and grant other than to relieve unemployment through the construction of useful public works. However, even if there were an ulterior motive on the part of the Administrator, his actions, if within his proper powers, are not invalidated thereby.

Isbrandtsen-Moller Co. v. U. S., 81 L.Ed. 344.
Dakota Tel. Co. v. S. Dakota, 250 U.S. 163.
Spalding v. Dickinson, 161 U.S. 483.
West v. Hitchcock, 205 U.S. 80.

C. Plaintiffs have no standing to attack the validity of the proposed loan and grant.

Greenwood County has the right under South Carolina law to build and operate the proposed plant; to sell its power; to receive a gift of money from the United States and to borrow money for the construction of the project.

XXXVIII Stat. of S. C. 411, 1392, 1543.
Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870.

Plaintiff, having a non-exclusive franchise, cannot complain of competition by publicly-owned utilities.

Puget Sound Power & Lt. Co. v. City of Seattle, 291 U.S. 619.
Madera Water Works v. Madera, 228 U.S. 454.

Plaintiffs cannot attack the constitutionality of a statute or the act of an administrative officer as being in violation

of a statute unless they can show that they suffered a direct or special injury.

Massachusetts v. Mellon, 262 U.S. 447.
United Fuel Gas Co. v. R. R. Comm., 278 U.S. 300.

An act, although unauthorized, which infringes on right of a plaintiff, will not be enjoined merely because it will enable a third person to enter into competition with the plaintiff.

R. R. Co. v. Ellerman, 105 U.S. 166.
Chicago Junction Case, 264 U.S. 258.
Sprunt & Sons v. U. S., 281 U.S. 259.
Edward Hines Trustees v. U. S., 263 U.S. 143.

CONCLUSION.

There is presented here no lack of uniformity in decisions of Circuit Courts of Appeal, which is considered as perhaps the main reason for giving to the United States Supreme Court the power of granting Writs of Certiorari.

Magnum Imp. Co. v. Coty, 262 U.S. 159.
Forsyth v. Hammond, 166 U.S. 506.

On the contrary every Circuit Court of Appeals that has passed upon a case involving loans and grants of the Public Works Administration to State sub-divisions for the establishment of a competing utilities system, has held as did the Circuit Court of Appeals for the Fourth Circuit in the present case; the Eight Circuit so holding in the case of *Arkansas-Missouri Power Co. v. Kennett*, 78 F.(2d) 911; the Tenth Circuit in the case of *Kansas Gas & Elect. Co. v. City of Independence*, 79 F.(2d) 638, and the Circuit Court of Appeals for the District of Columbia in the case of *Alabama Power Co. v. Ickes*, ___ F.(2d) ___.

In conclusion we submit that the facts as established by the holdings of the two Courts below and the law as

established by former decisions of this Court, completely justify a denial by this Court of the Petition for Certiorari.

Respectfully submitted,

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Attorneys for Greenwood County and its Finance Board.

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS

v.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR RESPONDENT HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

The respondent Administrator does not oppose the granting of a writ of certiorari in this case.

The court below held, affirming the decree of the District Court, and reaffirming the conclusions reached on the former appeal, 81 F. (2d) 986 (reversed on procedural grounds, 299 U. S. 259), (a) that the petitioners have no standing to